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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-827

CHARLOTTE AND JAMES B. SNOW, S. RICHARD AND ELEISE R. BAUMAN, RANDLE WADE, LARRY ANDREWS, DAVID COLEMAN, JR., ARTHUR DODSON, EDWARD EPPS, AND OTIS RUSSELL,

v. *Appellants,*

CITY OF MEMPHIS, GLEN FOSTER, CITY TREASURER; SHELBY COUNTY; RILEY C. GARNER, COUNTY TRUSTEE; GEORGE C. LAMANNA, TAX ASSESSOR; AND R. A. ASHLEY, JR., ATTORNEY GENERAL OF THE STATE OF TENNESSEE,

Appellees.

On Appeal from the Supreme Court of the State of Tennessee

JURISDICTIONAL STATEMENT

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CHARLOTTE AND JAMES B. SNOW, S. RICHARD AND ELEISE R. BAUMAN, RANDLE WADE, LARRY ANDREWS, DAVID COLEMAN, JR., ARTHUR DODSON, EDWARD EPPS, AND OTIS RUSSELL,

Appellants,

v.

CITY OF MEMPHIS, GLEN FOSTER, CITY TREASURER; SHELBY COUNTY; RILEY C. GARNER, COUNTY TRUSTEE; GEORGE C. LAMANNA, TAX ASSESSOR; AND R. A. ASHLEY, JR., ATTORNEY GENERAL OF THE STATE OF TENNESSEE,

Appellees.

On Appeal from the Supreme Court of the State of Tennessee

JURISDICTIONAL STATEMENT

This case is one of first impression, and includes, *inter alia*, questions of whether the State of Tennessee may impose a sixty percent (60%) greater tax burden upon residents who lease rather than own their homes, which residents constitute approximately one-third (1/3) of the residents of the State, and whether

the exclusion of approximately forty percent (40%) of an alleged class (income-producing residential property) from a classification is *de minimus* discrimination which can be defended as an exception to the requirements of the Equal Protection Clause.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 527 S.W.2d 55 (1975), and is set forth in Appendix A, *infra*. Final judgment appears as Appendix A-a *infra*. The opinion of the Chancery Court of Shelby County, Tennessee is unreported. The text of this opinion is set forth in Appendix B, *infra*.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of a provision of Article II, Section 28 of the Constitution of Tennessee, and portions of T.C.A. §§ 67-601(8) and (9) implementing said constitutional provision, on the grounds that said provision is repugnant to the Constitution of the United States.

Appellants commenced this action in the Chancery Court of Shelby County, Tennessee, seeking declaratory and injunctive relief,[1] and recovery of taxes paid under protest, on the grounds that a provision of Article II, Section 28 of the Constitution of Tennessee, which provides: "*provided that residential property containing two (2) or more rental units is hereby de-*

[1] This suit is also a test case supported by the Home Builders Association of Tennessee in behalf of its 3500 members and all owners of rental property and their tenants. Dozens of similar suits are pending in Tennessee under stipulations to await the outcome of this test suit.

fined as industrial and commercial property," was adopted in violation of the amendatory provisions of the Constitution of Tennessee, and that said provision, and T.C.A. §§ 67-601(8) and (9) implementing the constitutional provision, denied Appellants the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Chancery Court of Shelby County, Tennessee held the constitutional provision and statutes challenged herein to be in violation of the Tennessee Constitution and the Fourteenth Amendment, and therefore void. On appeal, the Supreme Court of the State of Tennessee, in an opinion filed on April 9, 1975, reversed the Chancellor's decision, and upheld the validity of the constitutional provision and statutes challenged herein. The Tennessee Supreme Court denied Appellants' petition for a rehearing in an opinion filed September 2, 1975. Notice of appeal to this Court was filed in the Supreme Court of Tennessee on November 20, 1975. Since the Supreme Court of Tennessee expressly rejected Appellants' challenge to the constitutional and statutory provisions involved as violative of the Fourteenth Amendment to the Constitution of the United States, this matter is appropriately brought to this Court on appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

(1) Constitution of the United States, Amendment XIV.

(2) Constitution of Tennessee, Article II, Section 28. The relevant portion of this Section is set forth in Appendix C, *infra.*

(3) Tennessee Code Annotated §§ 67-601(8) and (9). The text of these Sections is set forth in Appendix D, *infra.*

QUESTIONS PRESENTED

1. Can a state constitutionally tax "residential property containing two or more rental units,"—that is, apartments or duplexes,—on a basis of 40% of value while taxing all other residential property on a basis of 25% of value; or is not the singling out of such residential property for treatment as commercial and industrial property with its attendant higher resulting tax than on other residential property an invidious discrimination against the owners of such apartments and duplexes, and effectively against the families who make such apartments and duplexes their homes, forbidden by the Equal Protection of the Law Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Whether the State of Tennessee can classify all property except "residential property containing two or more rental units" on the basis of the use of the property, and classify residential property on the basis of whether it is income-producing residential property, without violating the Equal Protection Clause of the Fourteenth Amendment, and whether the exclusion of forty percent (40%) of such residential property from the alleged class of income-producing residential property is *de minimus* discrimination?

3. Whether the State of Tennesee can, consistent with the Due Process Clause of the Fourteenth Amendment, define white to be black, or residential property

to be industrial and commercial property, and thereby irrebuttably presume that residential property containing one (1) rental unit is not income-producing property, and residential property containing two (2) rental units is income-producing property?

STATEMENT OF THE CASE

The Tennessee General Assembly initiated a call for a constitutional convention by the enactment of Chapter 421, amended by Chapter 397, of the Public Acts of 1968. The proposed call provided for the amendment of Article II, Section 28 of the Constitution of Tennessee, but specifically limited the classification of real property for purposes of taxation into four (4) sub-classifications, (a) public utility property, (b) industrial and commercial property, (c) residential property, and (d) farm property, and established ranges of the percentage of assessment to value for each classification. The proposed call was approved by the people of the State in an election held in November, 1968.

The statute calling the convention was subsequently challenged as unconstitutional on the ground that the legislature had exceeded its authority by specifically prescribing the convention's authority to classify property. The Supreme Court of Tennessee upheld the statutory call as valid in *Illustration Design Group, Inc.* v. *McCanless,* 224 Tenn. 284, 454 S.W.2d 115 (1970).

Pursuant to the judicially approved call, the constitutional convention adopted a proposed amendment to Article II, Section 28 of the Constitution of Tennessee, which amendment conformed to the limitations of the call in all respects except one; *i.e.* the

classification of residential property, which was to be assessed at twenty-five per cent (25%) of its value, was amended to include the following: "*provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property.*" Under the proposed amendment, industrial and commercial property was to be assessed at forty per cent (40%) of its value. The people of the State of Tennessee, sixty per cent (60%) of whom reside in owner occupied dwellings, adopted the proposed amendment in a general election in 1972, to become effective in 1973.

This action was commenced by Appellants CHARLOTTE and JAMES B. SNOW, owners of a duplex with both sides rented to other residents, S. RICHARD and ELEISE R. BAUMAN, owners of several multi-family residential apartment buildings, and RANDLE WADE, LARRY ANDREWS, DAVID COLEMAN, JR., ARTHUR DODSON, EDWARD EPPS, and OTIS RUSSELL, each of whom are residents of apartments owned by the Baumans,[2] for a declaratory judgment of the invalidity of the proviso modifying the classification of residential property as violative of the Constitutions of Tennessee and of the United States, and for injunctive relief. The Appellants Snow and Bauman further sought a refund of the excess amount of property taxes required to be paid as a result of the unconstitutional provision.

The evidence in this case demonstrates that approximately one-third (1/3) of the residents of the State of Tennessee reside in leased residential property, and

[2] The discriminatory nature and effect of this tax as applied to the less-affluent members of society, who regard their apartments as their homes, appears in the testimony of Randle Wade. (Tr. pp. 31-40)

approximately forty per cent (40%) of the residents of Shelby County reside in leased residential property. (Tr. Ex.D). The evidence disclosed that the average income of residents in leased residential property is $5,000.00 per annum, whereas the average income of residents of owner-occupied residential property is $9,600.00 per annum. (Tr. Ex.D). Further, the record showed that a substantially greater percentage of minorities reside in leased residential property.[3] As a result of the Tennessee system of classification of property for taxation, a greater proportion of minorities and persons least able to afford it are required to incur a higher cost for their homes. The record demonstrates that in the long run, property taxes on leased residential property are passed on to the residents of such property in the form of increased rent. (Tr. Vol. I, pp. 87-88, 97-98). In this case, Appellants, Wade, Andrews, Coleman, Dodson, Epps, and Russell have already incurred a housing cost of $5.91 per month more for their leased homes than other residents would have to pay for homes of equal value. (Tr. Vol. I, p. 49, Tr. Ex. 3).

The evidence further showed that in Shelby County, Tennessee, where approximately forty (40%) per cent of the residents reside in renter occupied housing, approximately forty per cent (40%) of the renter-occupied units are single-family renter-occupied units. As a result of the classification of residential property containing *two* (2) or more rental units as industrial

[3] In the City of Memphis, twenty-five percent (25%) of the residents of owner-occupied residential property are Blacks, whereas forty-four (44%) per cent of the residents of leased residential property are Blacks. (Tr. Ex. D.)

and commercial property, of all residential property which is leased to residents, forty per cent (40%) of the property is assessed at twenty-five per cent (25%) of its value for purposes of taxation, with the remaining leased residential property being assessed at forty per cent (40%) of its value.

The duplex owned by Appellants Snow, which is zoned as residential property, was demonstrated to be identical in all material respects to a duplex next door, and to have the identical value as the other duplex. However, since the Snows' duplex is completely leased to other residents, whereas the adjoining duplex owner resides in one side of the duplex, the Snows' duplex is assessed at a value for taxation in an amount sixty per cent (60%) greater than the adjoining duplex. The 1973 property taxes on the Snows' duplex were $776.80, whereas the 1973 property taxes on the adjoining identical duplex were $485.38. This exceeds $24.00 per month tax, or $12.00 per unit per month tax than on identical property. (Tr. Vol. I pp. 23-26 Trial Ex. 1).

Further testimony in the case demonstrated the substantial interest and involvement of the United States in promoting the development of rental property for citizens in the State of Tennessee, as in all states. From 1934 to to 1972, the Federal Housing Administration has insured mortgages on 31,697 rental units in Tennessee, for a total amount of 342 million dollars. The Administration controls the rent on such units, and permits increased rentals as a result of increased property taxes. The testimony showed that the average increase in property taxes in Shelby County on rental property has increased thirteen per cent (13%) as a result of the constitutional provision challenged herein. (Tr. Vol. I pp. 79-82).

The evidence in the case further showed that the cost of providing governmental services for property containing multifamily dwellings was less than that for single family dwellings (Tr. Vol. I pp. 82, 87, 104).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In the Complaint filed in this cause, Appellants asserted that the classification of the residential property which they own or in which they reside as industrial and commercial property, and the taxation of such property at an amount sixty per cent (60%) higher than the tax imposed upon other residential property of equal value, constituted an arbitrary and capricious classification, and resulted in invidious discrimination against Appellants, in violation of the Equal Protection Clause of the Fourteenth Amendment. (Tr. Vol. II, p. 4). Plaintiffs further argued that if the justification of the classification was that the primary purpose of ownership of residential property containing two or more rental units was for financial gain, that the classification created an irrebuttable presumption that residential property containing two (2) rental units was income-producing property, and that residential property containing a single rental unit was not income-producing property.

The trial Court stated the question as follows:

> Finally, it is contended that if the classification of the property is to depend upon whether or not the owner's primary purpose is financial gain, then such classification is discriminatory as between owners of one rental unit and the owners of two or more such rental units, and also creates the

> irrebuttable presumption that contrary to fact, no single rental unit is owned and rented for financial gain. (Appendix B, p. 8).

The Court found that:

> (1) In this instance a taxpayer owning two or more rental units is liable for a greater tax proportionately than the owner of only one unit. The units could be identical in value, location, and otherwise the same insofar as the purposes of T.C.A. 67-606 are concerned, but one taxpayer pays 15% [4] greater tax than the other. Such discrimination is obvious. (Appendix B, p. 8).

The Court then concluded that the classification in question violated the Equal Protection Clause of the Fourteenth Amendment. (Appendix B, p. 9).

On appeal of the case to the Supreme Court of Tennessee by Appellees, Appellants contended in support of the lower Court's opinion that the classification violated the Equal Protection Clause of the Fourteenth Amendment, and that the attempted justification of the classification of residential property containing two (2) or more rental units as industrial and commercial property on the premise that such property is income-producing property would further constitute a denial of equal protection by basing the

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[4] While the percentage ratio of assessment to value of industrial and commercial property is forty percent (40%) compared to twenty-five percent (25%) for residential property, the tax on industrial and commercial property is sixty percent (60%) greater than the tax on residential property. As a mathematical computation this means that 37½% of the owners' total payment of tax on "residential property containing two or more rental units" is the excessive amount extracted from him directly, and from his tenants indirectly, than paid by owners and tenants of other residential property.

classification on a standard not applied in the classification of other properties and would create an irrebuttable presumption that no single-unit leased residential property was owned for income-producing purposes. (Reply Brief and Argument on Behalf of Appellees.)

The Tennessee Supreme Court considered the question of whether the classification violated the Equal Protection Clause of the Fourteenth Amendment. (Appendix A, pp. 16-17). The Court found there was discrimination to the following extent:

> With respect to the immediate issue before this Court, it is clear that there is discrimination in favor of the real property owner who lives in one-half of a duplex and rents the other half and in favor of the real property owner who rents one or more single-family residences. (Appendix A, p. 21).

The Court concluded, however, that the discrimination was minimal and insignificant and failed to make out a case of palpably arbitrary or invidious discrimination. (Appendix A, p. 21). In so finding, the Court expressly stated that the purpose and objective of the constitutional amendment was to tax income-producing property at a higher rate than owner-occupied residences and farms. (Appendix A, p. 20).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I

Residents of Residential Property Containing Two (2) or More Rental Units Bear the Economic Effect of the Tax Imposed Upon Such Residential Property Which Is Sixty Percent (60%) Greater Than the Tax on Other Residential Property, Which Results in Palpably Arbitrary, Capricious, and Invidious Discrimination Against One-third (⅓) of the Residents of the State, the Infringement of Their Right to Secure and Retain a Decent Home, and the Frustration of the National Goal of a "Decent Home and Suitable Living Environment for Every American Family."

A. *The characteristics of tenant-residents of the State.*

In the State of Tennessee approximately one-third (1/3) of the citizens reside in leased residential property, and in Shelby County, Tennessee, the percentage of tenants of residential property is approximately forty percent (40%). (Tr. Ex. D) The average income of tenants of leased residential property is $5,000.00 per annum, whereas the average income of homeowners is $9,600.00 per annum. (Tr. Ex.D) Moreover, approximately twenty-five percent (25%) of homeowners are members of the racial minority, whereas approximately forty-five percent (45%) of the tenants are minorities (Tr. Ex.D). Without any justifiiable reason, the State of Tennessee has denigrated these residents into second-class citizens for purposes of taxation, and has imposed a greater tax burden upon tenants of leased residential property, poor people, black, women and young people, who cannot afford the cost of a home, than upon other residents of the State.

B. *Property taxes on leased residential property are passed on to the residents of such property.*

The evidence in this case shows that property taxes on residential property containing rental units are passed on to the residents of such property. (Tr. Vol. I, pp. 87-88, 97-98). In addition, the pass-through effect of such taxes has been judicially recognized by this Court in *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 210-211 (1970), wherein the Court held state constitutional and statutory provisions limiting the right to vote on the issuance of general obligation bonds to real property owners to violate the Equal Protection Clause, stating:

> "Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent. Since most city residents not owning their own homes are lessees of dwelling units, virtually all residents share the burden of property taxes imposed and used to service general obligation bonds."

And *see Leggroan* v. *Smith,* 498 F.2d 168 (10th Cir. 1971), where the court held unconstitutional a jury selection method whereby only real property owners were considered for jury service, finding no justification for excluding persons who did not own their homes:

> "Many poor people, blacks, women and young people, who cannot afford the high cost of a home,

> as well as persons who simply prefer apartment living, all pay real property taxes, either directly or indirectly, through rent payments."

Id. at 171. *See also* cases cited at 498 F.2d 168, 171 ns. 4 and 5.

Since the ultimate burden of the greater tax on residential property containing two (2) or more rental units falls upon the residents of such property, the effect of the classification is to deny to such residents the equal protection of the laws. *See Truax* v. *Raich,* 239 U.S. 33 (1915), *Weissinger* v. *Boswell,* 330 F.Supp. 615 (M.D. Ala. 1971); *Crow* v. *Brown,* 332 F.Supp. 382 (N.D. Ga. 1971); and *Gowens* v. *City of Bakersfield,* 179 Cal. App. 2d 282, 3 Cal. Rptr. 746 (1960). In determining the validity of a tax, the Court should look to the operating effect of the tax.

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 443-44, 85 L.Ed. 267, 270, 61 S Ct. 246, 130 ALR 1229; *Lawrence* v. *State Tax Comm'n.,* 286 U.S. 276, 280, 76 L.Ed. 1102, 1105, 52 S Ct. 556, 87 ALR 374, and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State, or, in other words, to find the operating incidence of the tax. *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U.S. 77, 80, 82 L.Ed. 673, 677, 58 S Ct. 436."

American Oil Company v. *Neill,* 380 U.S. 451, 455 (1965); *see also Stewart Dry Goods Company* v. *Lewis,* 297 U.S. 550, 555-57 (1935).

Since the incidence and effect of the tax on residential property containing two (2) or more rental units, which is sixty percent (60%) greater than the tax on other residential property, falls upon the tenants of the property, the classification results in the arbitrary and capricious imposition of a greater tax on those less able to afford the tax, and results in a greater tax on a larger proportion of minorities unable to afford their own homes.

C. *The tax burden imposed upon residents of leased residential property infringes upon their right to secure and maintain a decent home.*

The very concepts upon which our Nation was born, "Life, Liberty and the Pursuit of Happiness," necessarily include, and are dependent upon, every man's right to a decent home. The Third and Fourth Amendments to the Constitution expressly provide for protection of citizens in their homes, and the Fifth and Fourteenth Amendments, prohibiting the deprivation of "life, liberty, or property, without due process of law," encompass the right to secure and retain a home.

While the state may not be required to, or require others to, provide housing, *Lindsey* v. *Normet,* 405 U.S. 56 (1972), the state may not arbitrarily infringe upon a person's right to secure and retain adequate housing; *i.e.* a decent home. In *Lindsey,* the opinion of Justice Douglas, concurring as to the invalidity of a state doublebond provision where a tenant appealed from an FED action, noted the importance of the home:

> Over a third of our population lives in apartments or other rented housing. The home—

whether rented or owned—is the very heart of privacy in modern America. . . .

Modern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary.

405 U.S. at 81-82.

Since the effect of the classification under the purported proviso is to impose a heavier tax burden on persons who rent, rather than own, their homes, it results in an increase of the cost to such persons to either secure or retain their homes. When this increased cost of housing to residents of residential property containing two or more rental units is coupled with the fact that such residents have approximately one-half the income of other residents of residential property, the resulting discrimination is invidious. In such a case, it is submitted that there is no justification for that type of classification:

Housing is, therefore, a fundamental interest. Even if the housing interest is not sufficiently important to independently elicit rigid scrutiny, the combination of this interest and the wealth classification should be found to constitute an invidious discrimination that will activate the overriding justification test.

Note, 56 Cornell Law Review 343, 348 (1971).

D. *The challenged classification and the resulting higher tax burden on residents of leased residential property frustrates the national goal of "a decent home and suitable living environment for every American family."*

The Congress of the United States has declared that the national policy is "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . ." 42 U.S.C. § 1441. This national policy has been reaffirmed in 12 U.S.C. 1701t as follows:

The Congress affirms the national goal, as set forth in section 1441 of Title 42, of "a decent home and suitable living environment for every American family."

The Congress finds that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; and in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.

An example of how the classification in question has operated to frustrate the national goal of "a decent home and suitable living environment for every American family" is demonstrated in this case, where the Federal Housing Administration has insured mortgages for low and moderate income families in Tennessee on 31,697 rental units from 1934 to 1972.

(Tr. Vol. I, p. 79). The FHA controls the rent on rental units it insures, but permits rental increases to cover increases in taxes on the property. (Tr. Vol. I, p. 80). The record shows that the average increase in property taxes in Shelby County on FHA insured rental property has been thirteen percent (13%) as a result of the classification challenged herein.

Appellants submit that the question presented is one of substantial significance, not only to the citizens of Tennessee but to the citizens of the United States. The proportion of residents of leased residential property in Tennessee is similar to that of the United States, and the characteristics of such residents would be the same—low income families with a greater percentage of minorities. If the Court permits the State of Tennessee to impose the palpably arbitrary, capricious, and invidious discrimination upon its resident tenants, other states may attempt the same discrimination. For example, in *Boswell* v. *Howell,* 275 So. 2d 658 (Ala. 1973), the Alabama legislature attempted to define residential property to include only owner-occupied residential property for purposes of lower taxation. The equal protection issue was avoided when the Alabama courts held the term "residential property" could not be so restricted, and held the statute invalid. Tennessee tenant residents were not so fortunate in this case.

II

The State Constitutional Provision and Statutes Challenged Herein Deny Appellants the Equal Protection of the Law by Defining Residential Property Owned and Resided in by Appellants to Not Be Residential Property, Resulting in Palpably Arbitrary, Capricious, and Invidious Discrimination Against the Owners and Residents of Residential Property Containing Two (2) or More Rental Units, Which Residents Constitute One-third (⅓) of the Citizens of the State of Tennessee.

Under the 1972 amendment to Article II, Section 28, of the Constitution of Tennessee, which provides for an ad valorem tax on real property, four (4) classifications of real property are established, with the following assessment rates: (1) public utility property, to be assessed at fifty-five per cent (55%) of its value; (2) industrial and commercial property, to be assessed at forty per cent (40%) of its value; (3) residential property, to be assessed at twenty-five (25%), of its value; and (4) farm property, to be assessed at the same rates as residential property. (Appendix C, *infra.*) Inserted into the residential property classification is the proviso challenged herein, which states that certain residential property is not residential property as follows:

> "provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property."

The result is a classification of residential property containing two (2) or more rental units as a separate class of residential property which is assessed at forty per cent (40%) of its value, while the other class of residential property, containing one rental unit or an

owner-occupied unit, is assessed at twenty-five (25%) per cent of its value.

The Tennessee Supreme Court attempted to justify the classification in question on the ground that residential property containing two (2) or more rental units is income-producing property. However, the classification system adopted by the State is based upon the *use* of property, not whether property is income-producing property. T.C.A. § 67-611 provides that all property shall be classified according to *use,* and T.C.A. § 67-601(8) defines "industrial and commercial property" to include all property used for commercial purposes, "whether conducted for profit or not. . . ." In no other classification of property is the use of property separated from the ownership to determine the classification.

Public Utility property, industrial and commercial property, and farm property are each income-producing property, yet the tax assessments on these properties are based upon fifty-five percent (55%), forty percent (40%) and twenty-five percent (25%) of value, respectively. When farm property or public utility property is owned by one person and leased to another for profit, such properties are not thereby reclassified as industrial and commercial property, whereas residential property owned by one person and leased to another is classified as industrial and commercial property. Thus, the use of property determines its classification for all properties except residential property containing two or more rental units. The application of this arbitrary distinction to residential property containing two (2) or more rental units, which is expressly recognized to be residential property, is so palpably arbitrary and capricious as to constitute invidious discrimination.

The tax in question is a property tax, not an income tax, and the presumption that residential property which contains two (2) rental units is income-producing property, while residential property which contains one rental unit is presumed not to be income-producing property, is a wholly improper basis for classification of property. Since the tax is a property tax, based upon the nature of the property and its use the discrimination against residential property containing two (2) or more rental units cannot be justified on the basis of the alleged income-producing status of such property.

A similar justification of a classification of gross sales by amounts for taxation rates was rejected by the Court in *Stewart Dry Goods,* 294 U.S. 550 (1935), where the Court found the claimed relation of gross sales to net profits would not justify the discriminatory classification since the tax was on gross sales and not net income. 294 U.S. at 558. In addition, the Court found no basis for the claimed relation of gross sales of net income:

> "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross sales and net profits vary with the character of the business as well as its volume. Id. at 558-59."

Just as the rate of profit from retail sales varies with the character of the goods sold and the management

of the business, the rate of profit on rented residential property varies with the nature, net number, of the residential units, and the management of the residential units. (Tr. Vol. I, p. 97).

While the state has the authority to make reasonable classifications of property for purposes of taxation, it is well established that:

> "there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "

Allied Stores of Ohio v. *Bowers,* 358 U.S. 522, 527-29 (1959). In this case the classification in question has absolutely no relation to the taxation scheme. The tax on real property is an ad valorem tax, which is a tax "according to the value" of the property. Black's Law Dictionary 58 (4th Ed. 1968). In determining the value of property, the number of living units, whether rented or not, is necessarily included in the total valuation of the property, but bears no relation to the classification of the property. Only the nature of the property, and not its quantity, can form the basis for classification under the system of taxation in effect in Tennessee. In *Stewart Dry Goods Company* v. *Lewis,* 294 U.S. 550 (1935), the Court held a state gross sales tax invalid on the basis of the classification of different amounts of sales at varying tax rates, stating:

> "Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be . . . *a tax on land similarly graduated according to the number of parcels owned.* 294 U.S. at 557" (Emphasis Added).

See also *Cotting* v. *Godard,* 183 U.S. 79 (1901); *In Re Cope's Estate,* 191 Pa. 1, 43 A. 79 (1899). The State of Tennessee has arbitrarily graduated the tax on residential property by sixty per cent (60%) when a property owner owns two (2) instead of one rental units on a parcel of property. The mere factor of numbers forms no reasonable basis for the classification in question.

The Tennessee Supreme Court admitted there was discrimination against the owner of residential property containing two (2) rental units, but found the discrimination to be minimal and insignificant. (Appendix A, p. 21). This finding was based upon a record showing that the residential property containing rental units in the Shelby County Metropolitan Area, forty per cent (40%) of the property contained one rental unit. (Tr. Ex D). Appellants suggest that the exclusion of forty per cent (40%) of the designated class is in no way *de minimus* discrimination, bears no relation to the purpose of the taxation system, and is palpably arbitrary and capricious.

III

The State of Tennessee Has Denied Appellants Due Process of Law Under the Fourteenth Amendment by Creating an Irrebuttable Presumption That Residential Property Containing One Rental Unit Is Not Income-Producing Property, and That Residential Property Containing Two (2) Rental Units Is Income-Producing Property.

The Supreme Court of Tennessee found that the "purpose and objective of the Question 3 Amendment is to tax income-producing property at a higher rate

than owner-occupied residences and farms." (Appendix A, p. 20). That judicially attempted justification of the discriminatory classification challenged herein is inconsistent with the classification system enacted, which classified farms and residential property containing one rental unit, both of which properties are income-producing properties, on a preferential basis. The tax in question is not an income tax, but a property tax, and the classification of each type of property is based upon its use.

In regard to residential property which contains rental units, the effect of the classification of residential property containing two (2) or more rental units as industrial and commercial property, and the justification of the classification as being based upon the income-producing nature of the property, is the creation of an irrebuttable presumption that residential property containing two rental units is income-producing property, and that such property containing one rental unit is not income-producing property. While the Supreme Court of Tennessee found it "inconceivable that any investor would be in the business of renting single-family residences," (Appendix A, p. 21) the very existence of single-family residences which are rented refutes this conclusion, and the fact that forty per cent (40%) of the residential rental units in Shelby County are single residential units renders the Court's conclusion absurd.

The irrebuttable presumptions created by the challenged classification which are contrary to fact, *i.e.* that residential property containing two (2) rental units is not residential property, that residential property containing one rental unit is not income-producing property; and that residential property containing two (2) rental units is income-producing property, violate the due process clause of the Fourteenth Amendment in the same manner as the irrebuttable presumptions held invalid by the Court in *United States Department of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441, 446-48 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971); and *Carrington* v. *Rank,* 380 U.S. 89 (1965).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, with briefs on the merits and all argument, for the resolution of the important questions presented.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CHARLOTTE SNOW, ET AL., *Plaintiffs-Appellees*

VS.

CITY OF MEMPHIS, ET AL., *Defendants-Appellants*

KENMONT APARTMENTS, *Plaintiff-Appellant*

VS.

THE METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, ET AL.,
Defendants-Appellees.

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Hon. Charles A. Rond,
Chancellor

Davidson Equity
Hon. Ed R. Davies,
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OPINION

(Filed April 9, 1975)

These two cases were consolidated for oral argument, and will be disposed of in one opinion.

All plaintiffs, except the tenant-plaintiffs, are owners of real property containing two or more rental units used for dwelling purposes. Such property is defined as commercial property in Article II, Section 28(c) of the Constitution of Tennessee, as a result of the well known and much litigated Question 3 amendment.

Plaintiffs Snow, et al., filed a declaratory judgment action in the Chancery Court of Shelby County, asserting that the Constitutional Convention of 1971 exceeded the limitation of the call and created a fifth classification of real property when it defined residential property containing two or more rental units as commercial property. An adjudication declaring said amendment unconstitutional, as violative of Article XI, Section 3, Tennessee Constitution and the 14th Amendment, U. S. Constitution, was sought. From a decree sustaining plaintiff's contention, the City of Memphis, the County of Shelby, and the Attorney General of Tennessee, perfected a direct appeal to this Court.

Kenmont Apartments filed a similar action in the Chancery Court of Davidson County, and prosecutes in this Court an appeal from a decree holding said definition, of residential property, constitutional.

All plaintiffs further contend that the treatment of residential property containing two or more rental units as commercial property violates the equal protection clause of the 14th Amendment to the Federal Constitution.

Article II, Section 28 of the Constitution of Tennessee was amended, in compliance with the second method prescribed in Article XI, Section 3 of said Constitution. The

process was initiated by the Legislature's enacting Chapter 421, as amended by Chapter 597, Public Acts 1968. Said legislation submitted five questions to the electorate; only one of which, Question 3, received approval of the majority of the voters, in November, 1968.

The Question 3 call is set out in its entirety in Appendix A. The call provides, in affirmative terms, that Article XI, Section 28 of the Constitution shall require the classification of property into three classes, real property, intangible personal property, and tangible personal property, and that the Convention shall classify real property *only* into four sub-classifications, (a) public utility, (b) industrial and commercial, (c) residential, and (d) farm.

Delegates were elected to a Constitutional Convention in August, 1970, and in August, 1971 the Convention convened for the purpose of altering and reforming Article II, Section 28 of the Constitution of Tennessee, pursuant to the Question 3 call.

On September 14, 1971, the Convention adopted Resolution 74, which was approved by the voters in August, 1972.

Resolution 74, now Article II, Section 28 of the Constitution of Tennessee (see Appendix B), in setting out the classification of residential property, added the following: ". . . provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property."

This action of the Convention is said by the property owners to create a fifth sub-classification of real property beyond the limits of the call, in violation of Article XI, Section 3 of our Constitution.

In the Shelby County case, the learned Chancellor agreed with plaintiffs. He reasoned that, although the amendment as framed by the Convention was approved by the people, the people *first approved the call* limiting the sub-classi-

fication of real property to four specific categories, and the post-Convention approval of the people could not legitimate action, illegal in its inception; that the Convention created another sub-classification, to wit, income-producing rental units; that the number of occupants provided no basis of classification and that said action was "purely revenue producing." In finding the provision discriminatory, the Chancellor observed a taxpayer owning two or more rental units is liable for a greater tax proportionally than the owner of only one unit; that the units could be identical in value, location, and otherwise the same insofar as T.C.A. § 67-606 (basis of evaluation) is concerned, but one taxpayer pays a taxed based on 40% of actual value and the other 25% thereof. Reliance was evidently placed upon *Stewart Dry Goods Co.* v. *Lewis,* 294 U.S. 550 (1935), and *Gowens* v. *City of Bakersfield,* 179 Cal.App. 2d 282, 3 Cal.Rptr. 746 (1960).

In the Kenmont Apartments case, the learned Chancellor entered a decree upholding the constitutionality of the amendment to Article II, Section 28 of the Constitution, but did not file a memorandum opinion, as the case was heard just prior to the expiration of his term.

In both cases the plaintiffs presented evidence bearing upon the economic and sociological effects of taxing residential rental property at 40% of its value, as compared to taxing residential property at 25%. In both cases, the defendant taxing authorities presented countervailing evidence. The Memphis Chancellor held that all of the evidence was inadmissible, including the Journal of the Limited Constitutional Convention of 1971. We disagree. Some of the evidence introduced in both cases was admissible on the 14th Amendment issue. The Journal of a Constitutional Convention is admissible and the Court may, sua sponte, make use of a journal of proceeding of constitutional conventions when an issue presented makes such use relevant. See *State* v. *Cloksey,* 37 Tenn. 483 (1858),

and *Shelby County* v. *Hale,* 200 Tenn. 503, 292 S.W.2d 745 (1956). However, the posture of this case, and the view we take, makes it unnecessary to separate the admissible evidence from the inadmissible evidence.

Excellent briefs on behalf of every party to this litigation have been filed, including an amicus curiae brief on behalf of the Tennessee Municipal League and the Tennessee County Services Association, and every persuasive argument, pro and con, has been urged upon us, with superior advocacy.

Numerous definitions of the term "residential property" are cited. The word "residential" and thus the phrase "residential property" is elastic and flexible. The phrase may have different connotations in different statutes and situations. When used in connection with zoning, it has meaning in the light and purpose of zoning laws. When used in connection with taxation, it has, or may have, a different meaning, because the object or purpose of said law is entirely different. In the real estate business, the definition of residential property varies between property managers, builders, and lenders. The issue presented in this case cannot be resolved by the selection of one of the definitions of residential property tendered us in the briefs.

Likewise, the decision in this case cannot be predicated upon whether or not the Constitutional Convention created a fifth *sub-classification,* as vigorously contended by the plaintiffs, or whether or not the Convention merely *defined* residential property as asserted by defendants, with equal vigor.

The first issue presented by the plaintiffs' attack on the constitutionality of taxing two or more rental units as commercial property depends upon the proper interpretation and application of the phrase in Article XI, Section 3 of our Constitution, proscribing that no amendment shall become effective, "unless within the limitations of the call

of the Convention." That phrase has been before this Court for interpretation in connection with the Question 3 call in three prior cases.

The Question 3 call is substantially different from any prior call of a limited constitutional convention.[1] Its departure from the tenor of prior calls provided the issue in *Illustration Design Group* v. *McCanless,* 224 Tenn. 284, 454 S.W.2d 115 (1970). That suit was brought after approval by the people of the Question 3 call in November, 1968, and before the election of delegates to the Convention in August, 1970. Plaintiffs asserted that Chapter 421 of Public Acts of 1968, as amended, was unconstitutional because the Legislature had exceeded the limits of its power in drafting the call, by undertaking to dictate the specific terms of the amendment, thus usurping the function of the Constitutional Convention. In rejecting that contention, the Court said, inter alia,

> "It will be observed that, by the provision of the Constitution above quoted, (Art. 11, sec. 3, par. 2), the people have not only delegated authority to the Legislature to propose the call for a convention, and thus limit and define the scope and action of such convention, but they have expressly limited the consideration and action of the convention to the proposals already approved by a vote of the people and within the limits of the call, by this language:
>
> " '* * * and the convention shall assemble for the consideration of *such proposals as shall have received a favorable vote in said election,* . . .' " 454 S.W.2d 120.

The Court appears to place a great deal of emphasis on the effect of the language, "unless within the limitations of the call." Its holding has been urged upon this Court

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[1] Compare Apendix A with the three prior calls of limited constitutional conventions in Appendices C, D and E. The first legislative call of a limited constitutional convention was in 1949 and the first limited constitutional convention in this state's history convened in 1953.

in three subsequent lawsuits, including this one, as demanding a literal interpretation of that phrase with the result that it is said a constitutional convention must confine its deliberations and actions strictly within the detailed terms of the call. Said cases are *Southern Railway Company* v. *Dunn,* 483 S.W.2d 101 (Tenn. 1972), and *Southern Railway Company* v. *Fowler,* 497 S.W.2d 891 (Tenn. 1973).

In *Fowler,* the plaintiffs contended that the Constitutional Convention exceeded the limitations of the call by sub-classifying tangible personal property, and in authorizing the Legislature to sub-classify intangible personal property. The case was tried in the Chancery Court of Davidson County and then Chancellor Drowota, now a member of the Court of Appeals, filed a Memorandum opinion containing these incisive observations with respect to *Illustration Design Group* v. *McCanless,* supra:

> "This present litigation has revealed at least two adverse effects of the *Illustration Design Group* holding. The first is a very practical concern. That is, *Illustration Design Group* invites litigation like these present suits after every effort to amend the Constitution by the Convention method. Having granted the Legislature power to, in effect, draft proposed amendments, the Legislature can be expected to use that power to the fullest possible extent. The Constitutional Convention in the exercise of its discretion may frequently change or amend the Legislature's draft amendment (the Call). Assuming ratification, it can be safely predicted that opponents of the amendment will consistently bring suits like the present seeking to invalidate the ratified proposal on grounds that the Constitutional Convention exceeded the scope of its authority as defined by the Call.
>
> The second adverse effect, apparent from this present experience, is of constitutional significance. Stated simply, permitting the Legislature to draft every detail of a proposed constitutional amendment, and then requiring the Convention to adhere strictly to (*i.e.*

> rubber-stamp) the Legislature's product, effectively emasculates the Convention as an institution of constitutional dignity. It removes from the Convention all discretion in framing changes in the fundamental law of this State.
>
> As conceived by Article XI, Section 3, Constitution of Tennessee, the Constitutional Convention in its sphere of authority is an institution of at least equal dignity with the Legislature. The holding of *Illustration Design Group* makes the Constitutional Convention a puppet of the Legislature. It deprives the Convention of all significance as a constitutional institution."

It is apparent to this Court that such restrictions upon the function of a limited Constitutional Convention are contrary to the intent of the 1953 convention, and to legal and historical precedent in framing constitutional law in Tennessee and our sister states.

The issue thus presented, is of great significance in the fundamental law of this State and must be clarified.

A brief review of the background and events leading directly to the amendment of the second paragraph of Article XI, Section 3 of our Constitution, dealing with the Convention method of amendment, is appropriate.

The pre-amended provision as it appeared in our 1870 Constitution, with respect to amending by the Convention method, provided as follows:

> "The Legislature shall have the right, at any time by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed."

By Senate Joint Resolution No. 20, Public Acts of 1945, the Legislature authorized and directed the Governor to

appoint a Constitution Revision Commission. The purpose of the Commission was to make a study of the needs for revision of the Constitution of Tennessee and present its recommendations to the 1947 Session of the General Assembly. Seven distinguished lawyers were appointed by the Governor and, after more than a year of study, the Commission's report was submitted to the 75th General Assembly on November 8, 1946.

Said Commission recommended that nine sections of the Constitution be changed and devoted much of its report to the procedure best calculated to bring about the suggested changes. Eleven efforts to amend the 1870 Constitution by the legislative method had failed because of the obstacle of obtaining voter ratification by a majority of all those voting for representatives.[2] We judicially note, that in said efforts to amend by that process, only a small percentage of the voters who voted for representatives cast their ballots either for or against constitutional amendments, leaving the required majority of those voting for representatives, unattainable. After a careful study of the authorities, said Commission reached the conclusion that a limited constitutional convention was authorized by the above quoted Convention method contained in the 1870 Constitution, but an opinion from the Attorney General was requested. (Report of Constitution Revision Commission, pp. 2-8).

Attorney General Beeler rendered the requested opinion on May 16, 1946, finding a limited Constitutional Convention invalid and unconstitutional. Of sifinifiance to our inquiry is the following exerpt from his opinion:

> "The last sentence of Art. 11, Sec. 3, is the one using the wording 'to alter, reform or abolish.' This sentence

[2] "—And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Representatives, voting in their favor, ——" Article 11, Section 3, Constitution of 1870.

> and these words do not confer upon the Legislature the power or authority to limit the Constitutional Convention to a consideration of any particular amendments; *but a Constitutional Convention once called and assembled is sovereign in character and must be left free to either 'alter, reform or abolish' the existing Constitution.* To hold otherwise would be to reduce the Constitutional Convention to nothing more nor less than a rubber stamp. Its members would be shackled and manacled . . . in common, every day language 'hamstrung' and 'hogtied.' The framers of this constitutional provision intended to provide the State with the benefit of the collective coordinate judgment of the individual members making up the Constitutional Convention and it was not intended that the Legislature by a limiting Act could short-circuit the Constitutional Convention by *the submission* to it of certain specific amendments. To hold otherwise would be to reduce the Convention to a servile agency of State Government." *(Emphasis supplied).*[3]

As a direct result of the Attorney General's opinion, the report of the Constitution Revision Commission and the enactment of Chapter 49, Public Acts of 1949, calling a limited Constitutional Convention to consider the nine changes recommended by said Commission, the landmark case of *Cummings* v. *Beeler,* 189 Tenn. 151, 223 S.W.2d 913 (1949), was filed.

The suit was brought by Cummings in his official capacity as Secretary of State, seeking a declaratory judgment as to the constitutionality of Chapter 49 of the Public Acts of 1949, for the immediate purpose of determining whether or not the Secretary of State should expend public funds for the holding of the special election on November 8, 1949, submitting the question of calling the limited Constitutional Convention. The court observed that it must be conceded that authority is granted to the Legislature to propose to the people a call of a convention to alter,

[3] Among the cases relied upon by General Beeler in reaching the foregoing conclusion were: *Carton* v. *Sec. of State,* 151 Mich. 337; *Goodrich* v. *Moore,* 2 Minn. 49; *Sproule* v. *Fredericks,* 69 Miss. 898.

reform or abolish the Constitution as a *whole;* that the question to be determined was whether or not the call could *limit* the convention to amending the Constitution *in part*. 223 S.W.2d, at 921. In upholding the 1949 Act and establishing the limited constitutional convention as a political entity, Justice Burnett, writing for the Court, said:

> "The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people not in the Legislature. . . . The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States.
>
> * * *
>
> The Constitutional provision above quoted does not prohibit the revision or amendment of *a part* of the Constitution by the Convention method. . . . The thing that the people call a Convention for is not to revise or to write a new Constitution, but *only a part* thereof. The people having thus voted to circumscribe the limits of their elected Convention delegates, in the particulars as provided for in the Act, bind these delegates within these limits." (Emphasis supplied). 223 S.W. 2d, at 923.

An examination of the call portion of Chapter 49, Public Acts of 1949, at issue before the Court in *Cummings,* reveals that the *parts* of the Constitution proposed to be submitted for Convention consideration are described only by article and section number and the subject matter of the section.

The 1949 call for a Constitutional Convention was rejected by the voters. The 1953 Constitutional Convention was called by Chapter 130, Public Acts of 1951, and approved by the people at the election held on August 7, 1952. Said call omitted three issues that were included in the 1949 call and designated the six issues submitted by article and section number and subject matter.

One of the six issues before the Convention was Article XI, Section 3. As amended by that Convention and ratified by the people, the Convention method of our Constitution reads as follows:

> "The Legislature shall have the right by law to submit to the people, at any *general election,* the question of calling a convention to alter, reform, or abolish this Constitution, *or to alter, reform or abolish any specified part or parts of it;* and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. *No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. No such convention shall be held oftener than once in six years.*"

The additions to the 1870 section (italicized above), dealing with the Convention method, provide explicit authorization for a limited constitutional convention. We have carefully examined the Journal of the Constitutional Convention of 1953 and it is abundantly clear that the purpose in adding the additional language that now appears in said paragraph, including the phrase "within the limitation of the call" was to confirm in the amending clause of the Constitution, the holding in *Cummings* v. *Beeler,* legalizing the political entity know as a limited constitutional convention, to make it mandatory that the work product of the Convention be submitted for ratification or rejection by the people, and to limit conventions to one in six years. The proponents of the amendment so stated, and the op-

ponents of the amendment, expressed complete confidence in the efficacy of *Cummings* v. *Beeler,* supra, as firmly establishing the limited constitutional convention, and considered any amendment to the Convention method to be unnecessary. Journal of Proceedings of Tennessee Limited Constitutional Convention, 1953, pp. 239, 763, 781-784.

The Constitution Revision Commission, the Supreme Court and, finally, the Limited Constitutional Convention of 1953, implicitly, if not explicitly, envisioned as the only limitation upon a constitutional convention the restriction of its deliberations to a particular section and the subject matter of that section of the Constitution; that a convention could be limited to a *part* of the Constitution, whereas, theretofore there was respectable opinion, including the Attorney General, that it could not be limited in any manner whatsoever.

We are convinced that it was never conceived that within the specified section and the subject matter thereof any further or additional restrictions would or could be placed upon a constitutional convention.

Accordingly, we hold that any restrictions in the call, exceeding a recitation of the subject matter of the existing section designated for consideration, are not binding upon the Convention, and the Convention is free to abolish, or to alter or amend the section to such extent and in such manner as it deems proper. If the Legislature, as the agent of the people, desires to submit to the people the question of calling a Constitutional Convention to consider new subject matter, not embraced in the Constitution, it, of course, may do so by an appropriate description of such subject matter, corresponding to the descriptive format used to describe the subject matter of existing Constitutional sections in the 1949, 1951, and 1962 calls. To the extent that the legislature includes affirmative proposals in the call, beyond the scope aforesaid, the excess is mere surplusage, in the nature of gratuitous advice, and even

though approved by the people, is not binding on the Convention, nor does it invalidate the call or the subsequent action of the Convention.

It must be remembered that the Convention method, whether limited or unlimited, is subjected to two votes by the people, the ultimate repository of all power. The primary purpose of the call vote is to determine whether or not the people are willing to *permit* a convention to *consider* altering, amending or abolishing the whole Constitution, or specified parts thereof. An affirmative vote for a convention, for limited or unlimited purposes, is a grant by the people to a historic deliberative body to write constitutional, fundamental law as distinguished from statutory law. Imperfection in the call, such as affirmative proposals exceeding the limits heretofore defined, does not invalidate the amending process. The second vote ratifies or rejects the word for word end result of the Convention's deliberative effort. The final validating step by the people is the most significant action in the entire amending process.

The courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment, after it has been ratified by the people. *Southern Railway Co.* v. *Fowler,* 497 S.W.2d 891, (Tenn. 1973); *People* v. *Sours,* 31 Colo. 369, 74 P. 167 (1903); *State* v. *Alderson,* 49 Mont. 387, 142 P. 210 (1914); *Weeks* v. *Ruff,* 164 S.C. 398, 162 S.E. 450 (1932); *State ex rel. Morgan* v. *O'Brien,* 134 W.Va. 1, 60 S.E.2d 722 (1948).

Applying the foregoing principles to the instant case, we do not interpret the Question 3 call as prohibiting the definition of residential rental property containing two or more rental units, as commercial property.

The other issue asserted by plaintiffs is that the definition under attack violates the equal protection clause of the 14th Amendment, U.S. Constitution. It is said that a

discrimination between residential property containing two or more rental units is palpably arbitrary, unreasonable and invidious and bears no rational relationship to any purpose for which it could have been created.

More specifically, it is earnestly insisted that rented single-family residences and duplexes occupied one-half by the owner enjoy the 25% assessment ratio, while an identical duplex with both sides rented and all multi-unit apartments, hotels, etc. are assessed at 40%

The applicable principles often enumerated by the Supreme Court of the United States are stated in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), as follows:

> ". . . The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. (Citations omitted.) 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our governmnt and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' Ohio Oil Co. v. Conway, supra, 281 U.S. at page 159, 50 S.Ct. at page 314.

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' (Citations omitted.) 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' Brown-Forman Co. v. Commonwealth of Kentucky, 217 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed. 883. State Board of Tax Com'rs of Indiana v. Jackson, 283 U.S. 527, 537, 51 S.Ct. 540, 543, 75 L.Ed. 1248. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy." (Citations omitted.)

In *Allied,* the Court was asked by a resident taxpayer who had merchandise stored in four Ohio warehouses to declare unconstitutional an Ohio statute taxing said goods, because of an exemption provided for non-resident owners storing merchandise. Addressing the issue presented by that discriminatory statute, the Court said:

> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. (Citations omitted.)
>
> "In the light of the law thus well settled, how stands appellant's case? We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor it is important that we should, Southwestern Oil Co. v. State of Texas, 217 U.S. 114, 126, 30 S.Ct. 496, 500, 54

L.Ed. 688, for a state legislature need not explicitly declare its purpose. But it is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes, in anticipation of future needs. Other similar purposes reasonably may be conceived. Therefore, we cannot say that the discrimination of the proviso which exempted only the 'merchandise or agricultural products belonging to a nonresident * * * if held in a storage warehouse for storage only' was not founded upon a reasonable distinction, or difference in state policy, or that no state of facts reasonably can be conceived to sustain it. For those reasons, it cannot be said, in the light of the settled law as shown by the cases cited, that the questioned proviso was invidious or palpably arbitrary and denied appellant the equal protection of the laws within the meaning of the Fourteenth Amendment."

More recently in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973), that Court had under consideration an ad valorem tax exempting the personal property owned by individuals but retaining the taxation of personal property owned by corporations. Mr. Justice Douglas, writing for the Court, quotes from *Allied*, and reaffirms the test as follows:

> "In that case we used the phrase 'palpably arbitrary' or 'invidious' as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530, 79 S.Ct., at 442. . ."

The history of real property taxation in this state, and the amendment itself, leaves no doubt whatever as to the purpose and objective of Article II, Section 28. As shown by the proof in *Louisville & Nashville R. R.* v. *Public Service Commission*, 249 F.Supp. 894 (1966), *affirm'd* 389 F.2d

247 (6th Cir. 1968), the railroad's property was being assessed in the counties of Tennessee in which it operated at not less than 55% of actual cash value, while other real property was being assessed at a statewide average of not more than 30%. In fact, according to proof in that case, properties other than utilities were being assessed in some counties as low as 7%, and in 22 counties the assessment was below 15%. The District Court and the Sixth Circuit held that practice to be in violation of the equal protection clause of the 14th Amendment.

In *Southern Railway Company* v. *Clement*, 57 Tenn.App. 54, 415 S.W.2d 146 (1967), the Chancellor and the Court of Appeals made it clear that in its pre-amendment status Article II, Section 28 provided no basis for the assessment of any species of property at less than its actual cash value. This Court denied certiorari in May, 1967. It is a matter of common knowledge that these two cases and the report of the Tax Study Commission created by legislative act in 1966 precipitated the amendment of Article II, Section 28, which was accomplished by the process known as Question 3.

The purpose and objective of the Question 3 amendment is to tax income-producing property at a higher rate than owner-occupied residences and farms. That such classification is constitutionally permissible is beyond question. The constitutional and statutory scheme that has resulted from the Question 3 amendment has brought about a state of uniformity and equality of assessment of real property in Tennessee that while not perfect can conservatively be described as vastly superior to its predecessor system in approaching the objective of equality and uniformity throughout the state within the classifications provided. Perfection in the taxation of real property is neither required nor attainable.

With respect to the immediate issue before this Court, it is clear that there is discrimination in favor of the real

property owner who lives in one-half of a duplex and rents the other half and in favor of the real property owner who rents one or more single-family residences. There is substantial proof in the Nashville case that single-family residences for rental purposes make a poor investment. The cost of land on the one hand and the savings to be effected in the construction and operation of multi-unit apartments render it inconceivable that any investor would be in the business of renting single-family residences. It is obvious that the Convention and the people deemed it reasonable to embrace within the favored classification of a owner-occupied residence, owners of additional single-family residences and the owner who lives in one-half of his duplex. On the proof and upon conditions of which this Court can take judicial knowledge, the two areas of discrimination mentioned above are, in our opinion, minimal and insignificant and wholly fail to make out a case of palpably arbitrary or invidious discrimination and are therefore within constitutionally permissible limits.

It follows that the statutes under attack herein, implementing Article II, Section 28, are constitutionally sound.

The foregoing opinion renders unnecessary any consideration of the issues raised on appeal by the Memphis tenant-plaintiffs.

The decree of the Chancery Court of Shelby County is reversed. Article II, Section 28, is declared by this Court to be constitutional and the decree of the Chancery Court of Davidson County is affirmed.

The costs are assessed against the plaintiffs in each case.

/s/ Wm. H. D. Fones
Wm. H. D. Fones,
Chief Justice

Cooper, Henry,
Brock, JJ., concur

Harbison, J.,
not participating

OPINION ON PETITION TO REHEAR

Denied

Wm. H. D. Fones, C.J.

(Caption Omitted in Printing)

(Filed September 2, 1975)

The petition to rehear asserts that we have usurped the power of the people to control a constitutional convention and have misread and overruled *Illustration Design Group, Inc.* v. *McCanless, supra.*

We fully recognize that it is the people and not the legislature who approve or reject the submission of constitutional subjects to the consideration of a limited constitutional convention. The legislature in proposing a convention, and in proposing the subjects for its consideration, is not exercising its legislative power to enact statutory law. It is acting as an agency of the people, performing the first step in the amending process by the convention method.

It should be remembered that there are two (2) methods by which our Constitution may be amended: the legislative method and the convention method. Article Eleven, Section Three, Constitution of Tennessee. When the legislative method is used, the proposed amendment is drafted in toto, by the legislature and after the legislative approval prescribed in paragraph one of Article Eleven, Section, the amendment is submitted to the people for approval or rejection. When the convention method is used, historically, the convention has drafted and proposed amendments, upon those *subjects* included in the call. Paragraph two of Article Eleven, Section Three says that the delegates to such convention shall assemble for the consideration of such proposals as shall have received a favorable vote in the "call" election.

The convention method involves a vote of the people at three (3) separate elections covering a period of years and the expense of convening and maintaining delegates to a

convention. It is sheer folly to pursue the convention method unless the purpose is to have the convention draft amendments, that a busy legislature does not have the time to consider. If the legislature has the time to draft constitutional amendments then it should use the legislative method provided in paragraph one, Article Eleven, Section Three. The only legitimate purpose in calling a constitutional convention is to obtain its work product, to wit, a thoroughly debated, maturely deliberated, proposed constitutional amendment to recommend to the people. The people then make the final judgment upon its merit.

In drafting the Question Three call, the legislature deviated from the consistent prior procedure of merely designating specific subjects to be considered by a convention. This has created a serious problem. This is the fourth lawsuit attacking the constitutionality of the Question Three amendment. The basic contention in each case has as its substance, the extensive draft by the legislature of the subject matter of the amendment. The constitutional amending process by the convention method is threatened with instability, and at the center of the storm is the single issue of how far the legislature may go, as an agency of the people, in drafting a subject or a proposal for consideration by a limited constitutional convention.

No one could successfully contend that in calling an unlimited constitutional convention the legislature could draft the whole or any part of a proposed constitution. There is no authority anywhere for such a contention. The only distinction between an unlimited constitutional convention and a limited constitutional convention is that a limited constitutional convention can only consider a *specified part* or *parts* of the Constitution while an unlimited constitutional convention may consider the *whole* of the Constitution, and alter, reform or abolish any part, or all of it. The first three and one half lines of paragraph two Article Eleven, Section Three so provide. *Cummings* v. *Beeler, supra,* in establishing the validity of the limited constitutional convention so held.

We have held in this case that the legislative function, in acting as the agency of the people, to draft a call of a limited constitutional convention, is to specify the part or parts of the Constitution that the people may want a convention to consider. The call of a limited constitutional convention is not a *law* in the usual sense, and is not enacted by the legislature in the exercise of its fundamental authority to enact statutory law. It does not take effect when enacted by the legislature and has no efficacy until approved by the people. *West* v. *Carr,* 212 Tenn. 679, 370 S.W.2d 469 (1963). When approved by the people its only vitality is that it prescribes the subjects, or the *parts* of the Constitution that the convention may consider, and has the effect of proscribing that the convention cannot consider subjects or parts of the Constitution that are not included in the call, as approved.

The assertions in the petition to rehear with respect to *Illustration Design Group, Inc.* v. *McCanless, supra,* reflect a misunderstanding of our opinion in the instant case.

In referring to the legislative function of proposing the subjects the people may want a limited constitutional convention to consider, that case uses phrases which do not not appear in any of the authorities cited therein and have caused confusion to the bench and bar of this State. Instead of what we consider the appropriate language derived from *Cummings* v. *Beeler, supra,* to wit, that the proposed call should specify the part or parts of the Constitution or the subject, the case under discussion used the following phrases:

"delineating the scope and power of such convention"

"defining its scope and powers" (454 S.W.2d at 119)

"define the scope and action of such convention"

"but they have expressly limited the consideration and action of the convention to the proposals already approved by a vote of the people" (454 S.W.2d at 120)

We agree with the result reached in *Illustration Design Group, Inc., supra*. We disagree with the use of the foregoing phrases, but only insofar as said phrases are interpreted to mean that the legislature may go further than the specification of parts of the Constitution or subjects, to be considered by a limited constitutional convention, and undertake to draft a substantial portion of the amendment itself.

The petition to rehear is denied.

/s/ Wm. H. D. Fones
Wm. H. D. Fones,
Chief Justice

Cooper, Henry,
Brock, JJ., concur

Harbison, J.,
not participating

In the Supreme Court of Tennessee

Shelby Equity
Hon. Charles A. Rond,
Chancellor

Charlotte Snow, et al., *Plaintiffs-Appellees,*

v.

City of Memphis, et al., *Defendants-Appellants.*

FINAL JUDGMENT
AS OF SEPTEMBER 2, 1975

This cause came on to be heard upon a transcript of the record from the Chancery Court of Shelby County, assignments of error, briefs, and supplemental briefs of the parties, and argument of counsel, upon consideration whereof the Court is of the opinion that, in the decree of the Chancellor, there is reversible error.

By oversight, no final judgment was entered herein, in accordance with the Opinion of the Court filed on April 9, 1975, or in accordance with the Opinion filed herein on September 2, 1975, in which the Petition for Rehearing was denied by this Court on September 2, 1975.

It is, Therefore, Ordered, Adjudged and Decreed that the proviso, "Residential property containing two (2) or more rental units is hereby defined to be commercial and industrial property" contained in the amendment of Article II, Section 28 of the Constitution of the State of Tennessee, and the implementing act pursuant thereto, are not a denial of the constitutional rights guaranteed by and provided for in, the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, but are constitutional and valid under both the Constitution of the State of Tennessee and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED, effective as of September 2, 1975, when the Petition for Rehearing was denied, that the Complaint filed herein by the Plaintiffs be and is herewith dismissed, the Opinion and Decree of the Chancery Court of Shelby County, Tennessee are reversed, and the relief prayed by the said Plaintiffs is denied, all in accordance with the Opinion of the Court entered as aforesaid and the Opinion entered herein on September 2, 1975 overruling the Petition for Rehearing.

IT IS FURTHER ORDERED AND ADJUDGED that the costs of this action be and are herewith assessed against the Plaintiffs, and against John D. Martin, Jr., Surety.

APPROVED AS TO FORM AND FOR ENTRY:

/s/ JOHN D. MARTIN, JR.
John D. Martin, Jr.
JOHN D. MARTIN, JR., ATTORNEY FOR CHARLOTTE AND JAMES B. SNOW, S. RICHARD AND ELEISE R. BAUMAN, RANDLE WADE, LARRY ANDREWS, DAVID COLEMAN, JR., ARTHUR DODSON, EDWARD EPPS, AND OTIS RUSSELL

/s/ CHARLES V. HOLMES
Charles V. Holmes
Attorney for City of Memphis, GLEN FOSTER, *City Treasurer*

/s/ J. MINOR TAIT, JR.
J. Minor Tait, Jr.
Attorney for Shelby County, RILEY C. GARNER, *County Trustee,* GEORGE C. LAMANNA, *Tax Assessor*

/s/ EVERETT H. FALK
Everett H. Falk
by J. M. T.
Attorney for R. A. Ashley, Jr., Attorney General of the State of Tennessee

Entered on November 26, 1975, as of September 2, 1975.

Appendix B

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 78149-3 R.D.

CHARLOTTE SNOW, ET AL., *Plaintiffs,*

vs.

CITY OF MEMPHIS, ET AL., *Defendants.*

MEMORANDUM OPINION

This is a suit for a declaratory judgment seeking to have declared unconstitutional that part of Article II, Section 28(c) of the Constitution as amended in 1972 wherein certain residential property is classified as industrial and commercial, and fixes for such a higher rate of assessment.

The plaintiffs are Charlotte Snow and husband, and S. Richard Bauman, and wife, who in addition to the declaration, seek recovery of the claimed illegal part of the taxes paid under protest to the City and County.

There are also a group of plaintiffs, who are tenants of the plaintiffs Bauman, and seek the same relief as the other plaintiffs, claiming that, as their lease requires that they pay a proportionate share of any tax increase, they have a justiciable interest in the question involved. They style themselves Tenant-Plaintiffs.

The defendants are the City of Memphis and the City Treasurer, Shelby County and the County Trustee, the County tax Assessor and the Attorney General.

The cause came on to be heard upon the original and amended complaint, answers of all defendants, testimony of the parties and their witnesses, and briefs and argument of counsel.

The questions involved are:

1. Do those plaintiffs identified as tenant-plaintiffs have a real interest in the subject matter of this action such as to constitute a genuine justiciable controversy between said plaintiffs and the defendants under the Tennessee declaratory judgment statutes, T. C. A. §§ 23-1101 et seq?

2. Did the constitutional convention exceed the limitations of its call by defining as "industrial and commercial property" certain income producing property of a residential character?

3. Is the classification of residential property containing two or more rental units as industrial and commercial property in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution?

4. Can economic and sociological factors be considered as constituting grounds for determining the invalidity of the amendment?

There are also presented the evidentiary questions as to the admissibility of the journal of the Convention to ascertain what was the understanding and intention of the members, and the admissibility of data reflecting the economic and sociological effects of the application of the clause in question.

Insofar as the admissibility of the journal is concerned it may be assumed, from the very nature of that assemblage, that there was not a unanimity of opinion as to the meaning of the words "residential" or "commercial". Nor for that matter probably on any question. Hence, what source is the more reliable, the "pros" or the "cons"? The construction must be sought from a more basic source, the document itself.

The journal is inadmissible.

The economic and sociological factors can be, in certain instances, of importance is ascertaining the result of legislation, but in determining the construction to be placed upon

an unambiguous expression, such data absent other equally determinative factors, is as likely to be as misleading as informative.

The tendered evidence is inadmissible.

The defendants question the right of the tenant-plaintiffs to maintain this declaratory suit. As stated by the defendants in their brief, the rate of taxation in Shelby County has been 50% of the appraised value. Under this amendment it is 45%. Hence, any increase in the rent paid by those plaintiffs is not caused by the amendment. The schedules furnished and the tax bills filed as exhibits throw no light on the problem because there are other factors, such as changes in the tax base or valuation which are not reflected in the proof. Furthermore, if the plaintiff Bauman recovers it is to be presumed he will pay his personal obligations and reimburse his tenants.

It should also be noted that the recognized method of challenging the validity of the tax is to pay under protest and sue for recovery. None of these tenant-plaintiffs have established their right to test the constitutionality of the tax or the assessment by reason of any contract obligations. In fact, they have paid no taxes, under protest or otherwise. Such payments of rent as they might have made surely have been paid under no greater persuasion than in any landlord-tenant relationship.

The suit will stand dismissed as to such plaintiffs at the costs of the plaintiffs Bauman and Snow.

The determinative issues in this case are whether or not the convention exceeded the limits of the call, and whether or not the classification violates the Fourteenth Amendment to the U. S. Constitution.

The pertinent parts of the call as set forth in Chapters 421 and 597 of the Public Acts of 1968, styled "Question 3", are as follows:

"Provided that said Convention shall classify Real Property only into four (4) subclassifications, to wit:

(a) Public Utility Property, to be assessed at not less than 45 per-cent or more or more than 55 per-cent of its value, the exact percentage to be fixed by the convention;

(b) Industrial and Commercial Property, to be assessed at not less than 35 per cent or more than 45 per cent of its value, the exact percentage to be fixed by the convention.

(c) Residential Property, to be assessed at not less than 25 per cent or more than 35 percent of its value, the exact percentage to be fixed by the convention; and

(d) Farm Property, to be assessed at not less than 20 per cent or more than 25 per cent of its value, the exact percentage to be fixed by the convention.

The same portion of Question 3 as adopted by the convention and submitted to the electorate as part of the proposed amendment to Article II, Section 28(c) of the Tennessee Constitution is as follows:

"Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40) per cent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) per cent of its value, *provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property;*

(d) Farm Property, to be assessed at twenty-five (25%) per cent of its value."

It is claimed that the italicized phrase in the foregoing created a further subclassification of residential property contrary to the limits of the call.

To the extent that this creates a further classification of real property it is void because the sub-classifications of real property was limited to four. *Southern Railway Company* v. *Fowler* (Sup. Ct. 1973), 497 S. W. 2d 891, 895.

The defendants claim that since the amendment was approved by the people, the ultimate source of the power to create, alter or abolish the Constitution and the amendment, having been adopted as framed by the Convention, it bears the imprimatur of the people as evidence of its validity.

This argument overlooks the steps requisite to a valid amendment. The call as approved by the electorate is just as binding upon the Convention as upon the people. *Cummings, Secretary of State* v. *Beeler* (1949) 189 Tenn. 151, 223 S. W. 2d 913. A stream can rise no higher than its source. It is true that the authority of a Constitutional Convention under a call should be broadly construed, but always to be limited by the call—in this case the power to classify into four (4) specified categories. Unless the amendment offered is within the limits of the call no subsequent action could legitimate action not legal in its inception.

The defendants point out that the classification of properties of a residential character which are operated for revenue purposes are primarily commercial enterprises and properly within the category of "Industrial and Commercial".

In summary, it is the theory of the defendants that the term "Commercial" admits of a broad definition of property used for revenue purposes as well as the narrow definition limited to barter and sale.

Assuming this to be correct then any type of property held for revenue purposes becomes commercial, and farm lands of held for revenue would justify the same classification.

The call requires property to be classified into only four categories, and what the Convention did was to create another, namely, income producing residential units. The number of occupants certainly justified no basis of classification, hence it resolves itself into purely revenue producing.

It is next claimed that before the classification can be deemed unconstitutional it must be shown that it is not merely discriminatory, but is arbitrary and confiscatory. That may be true generally, but the test in this case is whether such classification as created is within one of the categories as established by the call. A classification in this instance has as its major premise of validity its compliance with definition of public utility property, industrial and commercial property, residential property and farm property. Unless it can meet that test the issue of a discriminatory or arbitrary tax never arises.

It should be remembered that the use of the property is the basis of classification and not the purpose or motive of the owner. If the term "industrial and commercial" can be applied to residential use, then the same distinctions could be applied to the other categories, and the classification of the property would depend upon the motive of the owner.

Finally, it is contended that if the classification of the property is to depend upon whether or not the owner's primary purpose is financial gain, then such classification is discriminatory as between owners of one rental unit and the owners of two or more such rental units, and also creates the irrebuttable presumption that, contrary to fact, no single rental unit is owned and rented for financial gain.

The method of classification must bear some reasonable relationship to the objective sought—in this case, to classify income producing property at a higher rate than an owner-occupied residence.

The plaintiffs rely upon *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935), and *Gowens* v. *City of Bakersfield*, 179 Cal. App. 2d 282, 3 Cal. Rptr. 746 (1960). In the first case the Court held that a tax calculated on the basis of gross sales was in violation of the equal protection clause of the Fourteenth Amendment as would be, by analogy, a tax graduated according to the number of parcels owned.

In this instance a tax payer owning two or more rental units is liable for a greater tax proportionally than the owner of only one unit. The units could be identical in value, location, and otherwise the same insofar as the purposes of T.C.A. 67-606 are concerned, but one taxpayer pays 15% greater tax than the other. Such discrimination is obvious.

In summary, the tax is unconstitutional because the Convention exceeded the limits of the call in creating a fifth category, namely, residential property with two or more rental units, and the application of the tax violates the equal protection clause of the Fourteenth Amendment.

A decree in accordance with this memorandum shall be submitted in which decree the parties shall preserve their exceptions.

/s/ CHARLES A. ROND
Charles A. Rond
CHANCELLOR
7/11/74

Appendix C

Sec. 28. Taxable property—Valuaton—Rates.—In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) per cent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) per cent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) per cent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) per cent of its value

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide tax relief to elderly low-income taxpayers through payments by the State to reim-

burse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities or Towns; provided, that such tax relief for the years 1973 through 1977 shall be not less than an amount equal to the State, County, and Municipal Taxes on Five Thousand ($5,000) Dollars worth of the full market value (or One Thousand Two Hundred Fifty ($1,250) Dollars of the assessed value) of property used for a residence by any taxpayer over sixty-five (65) years of age for a period of one (1) year prior to the date of assessment; provided further, that such relief shall not extend to persons having a total annual income from all sources in excess of Four Thousand Eight Hundred ($4,800) Dollars.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) per cent of its value;

(b) Industrial and Commercial Property, to be assessed at thirty (30%) per cent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) per cent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and shall provide fair and equitable methods of apportionment

of the value of same to this State for purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ratio of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redeemable or cash value of all of their outstanding shares of capital stock, policies of insurance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. The portion of a Merchant's Capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973. [As Amended; Adopted in Convention September 14, 1971; Approved at election August 3, 1972.]

Appendix D

Tennessee Code Annotated § 67-601:

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(9) "Residential property" is hereby defined to include all real property which is used, or held for use, for dwelling purposes and which contains not more than one rental unit. All real property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

Appendix E

IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

CHARLOTTE SNOW, et al., *Plaintiffs-Appellees,*

v.

CITY OF MEMPHIS, et al., *Defendants-Appellants.*

SHELBY EQUITY
NO. 1

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Charlotte Snow and James B. Snow, S. Richard and Eleise R. Bauman, Randle Wade, Larry Andrews, David Coleman, Jr., Arthur Dodson, Edward Epps, and Otis Russell, the plaintiffs-appellees above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Tennessee, entered in this action on September 2, 1975, in Opinion and Order denying plaintiffs-appellees' Petition to Rehear, the Court's decision of April 9, 1975, reversing the decision of the Chancery Court of Shelby County, Tennessee, said Chancery Court having rendered judgment in favor of plaintiffs-appellees declaring a portion of Article II, Section 28(c) of the Tennessee Constitution, and statutes enacted pursuant thereto, unconstitutional and void, as being a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-827

CHARLOTTE SNOW, et al.,
Appellant,

v.

CITY OF MEMPHIS, et al.,
Appellees.

On Appeal from the Supreme Court
of the State of Tennessee

MOTION TO AFFIRM

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OCTOBER TERM, 1975

No. .....

CHARLOTTE SNOW, et al.,
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Appellees.

On Appeal from the Supreme Court
of the State of Tennessee

MOTION TO AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees respectfully move the Court to affirm the judgment of the Supreme Court of the State of Tennessee on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

The Classification of Residential Property Containing Two or More Rental Units as "Industrial and Commercial Property" for Property Tax Purposes as Mandated by Article II, Section 28 of the Tennessee Constitution Is Well Within the Range of a State's Discretionary Power to Establish Classifications in the Laying of Taxes.

A. The State's power to establish tax classifications.

A long line of authorities provided by this Honorable Court establishes that classifications for purposes of taxation are permissible under the equal protection clause of the Fourteenth Amendment; that the states have broad power to establish tax classification schemes; and that such classification schemes must be palpably arbitrary or invidiously discriminatory resting on no reasonable consideration of difference or policy before they will be deemed to offend the equal protection clause. *E.g., Kahn v. Shevin,* 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959); *Walters v. City of St. Louis,* 347 U.S. 231 (1954); *Welch v. Henry,* 305 U.S. 134 (1938); *State Board of Tax Comm'rs v. Jackson,* 283 U.S. 527 (1931); *Brown-Forman Co. v. Kentucky,* 217 U.S. 563 (1910).

The scope of the discretion permitted the states under the equal protection clause in establishing tax classification schemes was recently restated by Mr. Justice Douglas, speaking for a unanimous Court in *Lehnhausen v. Lake Shore Auto Parts Co., supra*:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals different from the others. The test is whether the difference in treatment is an invidious discrimination . . . Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation . . ." 410 U.S. at 359.

The breadth of the leeway allowed the states in the area of taxation is also reflected in this Court's decision in *Allied Stores of Ohio v. Bowers, supra,* wherein it was held that a state, in establishing tax classifications, "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." 358 U.S. at 527.

It appears well-established by these and other holdings that a tax classification, although discriminatory, is not invidious or violative of the equal protection clause if any state of facts can be conceived that would sustain the classification. *E.g., Kahn v. Shevin, supra; New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938); *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495 (1937); *Rast v. VanDeaman & Lewis,* 240 U.S. 342 (1916). Thus, in testing classifications by the standards of the Fourteenth Amendment, questions of equal protection should be decided with respect to the general scope of the classifications rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers.

B. The logic of this particular classification.

Article II, Section 28 of the Tennessee Constitution prescribes four subclassifications of real property for property tax purposes:

> (a) Public Utility Property, to be assessed at fifty-five (55%) per cent of its value:

(b) Industrial and Commercial Property, to be assessed at forty (40%) per cent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) per cent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) per cent of its value.

The apparent thrust of a classification which places residential property containing two or more rental units in a commercial classification is to classify as "commercial" properties which afford residential accommodations but which are inherently commercial in the broad sense. Thus, in order to provide a means of distinguishing between income-producing commercial properties affording residential accommodations on the one hand and residential property on the other, a line was drawn at two or more rental units.

The logic and reasonableness of drawing the line at two or more rental units is apparent when viewed in the context of the purpose of the classification. Residential properties which are primarily commercial in the broad sense, such as multi-unit apartment buildings and hotels, are included in a commercial classification while residential properties which are not primarily commercial in the broad sense but which may incidentally produce rental income are included in a residential classification. This classification is conceivably related to the following purposes:

(a) Encouraging individual home ownership.

(b) Shifting the property tax burden from the individual home owner and farmer to income-producing commercial, industrial and utility properties.

(c) Providing a type of homestead tax relief which would compensate for inflationary trends by adopting a lower assessment ratio rather than an exemption of a fixed dollar amount.

That a classification may not be perfect or may leave out some that might conceivably have been included does not render the classification violative of the equal protection clause. *Allied Stores of Ohio v. Bowers, supra.* See generally *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

II

The Classification of Residential Property Containing Two or More Rental Units as "Industrial and Commercial Property" for Property Tax Purposes Imposes No Invidiously Discriminatory Tax Burden Upon Residents of Leased or Rented Multi-Unit Residential Property.

A. **Any discrimination inherent in the classification is neither hostile nor oppressive.**

In *Lehnhausen v. Lake Shore Auto Parts Co., supra,* this Court said, quoting in part from *Madden v. Kentucky,* 309 U.S. 83 (1939):

> ". . . 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' . . . there is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is hostile and oppressive discrimination, against particular persons and classes' . . . And the Court added, 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."
>
> 410 U.S. at 364

Appellees maintain that this language is equally applicable with respect to the power of the people to amend their state's constitution to prescribe reasonable systems of taxation.

Appellees insist that appellants have failed in their attempt to find hostile and oppressive discrimination against residents of leased or rented multi-unit residential property. In this respect appellees believe that Tennessee's classification of property is no more discriminatory against such tenants than a homestead exemption or the allowance of an interest expense deduction on a home loan for federal income tax purposes while not allowing a similar deduction for rent expenses. Compare 26 U.S.C.A. § 163, with 26 U.S.C.A. § 262. Moreover, appellees would observe that the property tax burden on residents of leased or rented multi-unit residential property is an indirect one, occasioned by the economic effect of taxation on rental payments or by contractual agreements between landlords and tenants. In this respect the economic effect of property taxes on tenants would appear to differ little from the economic effect on members of the public generally of other taxes paid by commercial or industrial enterprises and which are reflected to some extent in the prices of goods and services as a cost of doing business.

B. **Appellants have failed to show an actual increased tax burden on residents of leased or rented multi-unit residential property as a result of the Tennessee classification.**

While it is recognized that the property tax base is sixty per cent greater (40% v. 25% of value) on residential property containing two or more rental units than on single family residences, there has been no showing that the actual indirect tax burden on residents of leased or rented multi-unit residential property is actually greater than on the owners of single family residences having comparable accommodations and amenities. The cost of land and economies of scale suggest that multi-unit

residential property can offer comparable living accommodations and amenities at lower cost than a like member of single family residences. Thus, the cost of a single unit in a multi-unit apartment building is likely to be less than the cost of a comparable single family dwelling. Evidence to this effect was adduced in a companion case which was consolidated with the instant case on appeal to the Tennessee Supreme Court. See *Snow v. City of Memphis*, 527 S.W.2d 55, 66 (Tenn. 1975).

C. **The Supreme Court of Tennessee was correct in concluding that the areas of discrimination in the classification are minimal and insignificant.**

The Supreme Court of Tennessee in examining the classification found two areas of discrimination. These areas included discrimination "in favor of the real property owner who lives in one-half of a duplex and rents the other half and in favor of the real property owner who rents one or more single family residences." 527 S.W.2d at 66. It was noted, however, by the Tennessee Supreme Court that the economies of the situation militate against persons generally engaging in the business of renting single-family residences.

The areas of discrimination found by the Tennessee Supreme Court are a consequence of drawing a line in an attempt to distinguish properties which are primarily income-producing from those which are not income-producing or are only incidentally income producing. While the line drawn in the Tennessee classification at two or more rental units leaves out the single family rental residence as an income-producing rental unit thereby discriminating in favor of such residences, the line drawn represents a reasonable attempt to establish a permissible classification with a minimum discrimination. As observed by Mr. Justice Douglas speaking for a majority of the Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974):

> "Every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."

Appellees maintain that the imperfections contained in the classification are minimal and insignificant when viewed in the context of the entire range of the classification and that the Supreme Court of Tennessee correctly made such a determination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of the State of Tennessee should be affirmed.

Respectfully submitted

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